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No. 05-06-28

In The
Supreme Court of the United States

JANET LUTKEWITTE,

Petitioner,

v.

ALBERTO GONZALES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An employer is strictly liable for sexual harassment by a supervisor if that harassment involved a "tangible employment action." The Question Presented is:

Is a tangible employment action:

(a) "a significant change in employment status," a standard in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), or

(b) "an official act" taken by a supervisor, the standard in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004)?

PARTIES

The parties to this action are set forth in the caption. Attorney General Gonzales is sued in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Janet Lutkewitte respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on February 3, 2006.

OPINIONS BELOW

The February 3, 2006, opinion of the court of appeals, which is reported at 436 F.3d 248 (D.C. Cir. 2006), is set out at pp. 1a-48a of the Appendix. The district court did not issue an opinion in connection with its decision to decline to give the jury instruction at issue in this case. The judgment of the district court, dated December 19, 2003, is set out at p. 49a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on February 3, 2006. On May 1, 2006, Justice Stevens granted an extension of time until July 3, 2006, for the filing of a petition for writ of certiorari. (No. 05A980). The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 701(b) of Title VII, 42 U.S.C. § 2000e(b), provides in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agency of such a person. . . .

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(2), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

This case arises out of an extraordinary problem of sexual harassment and sexual abuse which the court below properly characterized as "unspeakably offensive and repulsive." (App. 9a). The perpetrator was David Ehemann, the Administrative Officer for the Washington Field Office of the Federal Bureau of Investigation and Ms. Lutkewitte's supervisor. Petitioner, Janet Lutkewitte, was at the time a GS-13 computer supervisory specialist. Both Lutkewitte and Ehemann were married. Lutkewitte's account of the events in question "was essentially uncontested at trial." (App. 14a). The Question Presented concerns the legal standard governing whether the government is liable under Title VII for the damages sustained by Ms. Lutkewitte.

Ehemann first began "making romantic and sexual overtures to Lutkewitte" at an FBI conference in Denver

in the spring of 1998. (App. 14a). Ehemann behaved strangely and insisted on being with Lutkewitte throughout the conference. At one point he pulled Lutkewitte aside to assure her that she would get a promotion and to admonish "if you stick with me you'll go higher."[1]

In the fall of 1998, Ehemann directed Lutkewitte to attend an FBI conference to be held in Las Vegas in January 1999. Ehemann instructed Lutkewitte that she was to go with him to the conference a day early so he could "teach her how to gamble," and that he had already arranged for her to fly with him from BWI airport, even though National airport was closer to her home.[2] Shortly before the scheduled Las Vegas conference, Ehemann was called to New York on other business; Lutkewitte changed her flight, and (in Ehemann's absence) attended the conference without incident.

The day that Lutkewitte returned from the Las Vegas conference, she received a message from Ehemann to call him in New York. Ehemann instructed Lutkewitte to come to New York immediately because he needed her help on FBI work there. Lutkewitte resisted, telling Ehemann that, based on his description of the project, one of the other computer specialists would be better qualified for the task. Ehemann insisted that Lutkewitte come to New York, and told her that he had already obtained approval for the trip from the Special Agent in Charge. When Lutkewitte objected that she could not come until the next day, Ehemann demanded that she come at once, asserting

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[1] J.App. 37-41. J.App. references are to the Joint Appendix in the court of appeals.

[2] J.App. 42-43.

that the work was "really backed up" and "I need you here today."[3]

Lutkewitte went to New York as instructed, expecting to go immediately to work at the New York FBI Field Office. As soon as Lutkewitte checked into her hotel, however, Ehemann phoned her and told her instead to meet him in the lobby and not to bring her notebook. Rather than going to the FBI office, Ehemann insisted that they go to dinner, where he drank and pressed himself against Lutkewitte, who attempted to move away. After dinner Ehemann announced that he was returning to his suite at the hotel, and asked that Lutkewitte accompany him.

Once back in his hotel room, Ehemann briefly discussed work. He then insisted that Lutkewitte sit beside him; she refused. Ehemann next grabbed Lutkewitte, pulled her over to his bed, forced himself on top of her, and began kissing her. When she was able to get free, Lutkewitte announced that she was going to call her husband and rushed from the room. Lutkewitte telephoned her husband, and then left her telephone off the hook for a period of time.[4]

When Lutkewitte placed the telephone back on the hook, Ehemann immediately called and announced he was coming to her room. When Ehemann got to Lutkewitte's room, she felt that she had no choice but to let him in. Once in her room, Ehemann, who was considerably larger than Lutkewitte, pulled her on to a bed. Ehemann undressed

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[3] J.App. 46-47.

[4] J.App. 50-51.

Lutkewitte, then himself; Lutkewitte feared she would lose her job if she resisted. Ehemann laid back on the bed and told Lutkewitte to play with him; she refused. He then took her head and pushed it toward him, indicating he expected oral sex; Lutkewitte again refused. Ehemann then lay on top of Lutkewitte and pretended he was having sex with her in order to stimulate an erection. Lutkewitte did not respond, but instead announced that she was sick and needed to sleep. Ehemann ultimately relented, put his clothes back on and left the room.[5]

The next day, Lutkewitte went to the New York FBI Field Office to work on the project in question. Just as she had suspected, Lutkewitte discovered that the project did not require someone at her level. Lutkewitte's presence in New York made so little sense that the Special Agent in Charge of the Washington Field Office took the unusual step of questioning the Special Agent in Charge of the New York office about why Lutkewitte was there.

Lutkewitte met after work with a number of other FBI agents. Ehemann was present at first, but then left the group. Distraught by the events of the previous night, Lutkewitte drank heavily. At the end of the night, Lutkewitte was so highly intoxicated that another FBI employee had to walk her back to her room.[6]

Lutkewitte has little memory of what happened after she returned to her room that night, remembering only vaguely that she threw up. However, when she awoke the next morning, she was wearing only a bra; she found on

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[5] J.App. 52-54.

[6] J.App. 55-56.

the bedside table a note from Ehemann, indicating that he had been in her room at some point during the night. At that juncture Lutkewitte did not know what had occurred. In the course of the investigation which followed, Lutkewitte ultimately learned that Ehemann had had intercourse with her while she was unconscious or too incapacitated to protest.[7] In New York, as in most states, sexual intercourse with a person too intoxicated to be able to consent is a felony.[8]

The next day, Ehemann ordered Lutkewitte to continue to work in New York, denying her request to return to the Washington FBI office. Lutkewitte went over Ehemann's head and asked the Special Agent in Charge of the New York Field Office for permission to leave. That New York FBI official granted Lutkewitte's request, and she returned immediately to Washington.[9]

When Ehemann returned to Washington, he pursued Lutkewitte aggressively. He repeatedly tried to kiss her on the mouth, came into her office and rubbed his groin against her, and cornered her in the elevator and attempted to kiss her there. Lutkewitte turned her head when Ehemann tried to kiss her, admonished him that there were cameras on the elevator at the FBI office, and leaned away from him when he tried to rub himself on her. Lutkewitte declined to return Ehemann's calls if they were not clearly about FBI work, and rejected his suggestion that they go on vacation together. Lutkewitte later testified that

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[7] J.App. 57-58.

[8] N.Y. Penal Code §130.05 (McKinney, 2004); *People v. Pawley*, 71 A.D. 2d 307, 423 N.Y.S.2d 69 (4th Dept. 1979).

[9] J.App. 58-59.

she was afraid that more aggressive rejection of Ehemann's advances would lead to serious retaliation.[10]

During this period, Ehemann took a number of steps calculated to curry favor with Lutkewitte or reward her for the events that had occurred in New York. Ehemann arranged for Lutkewitte to receive a new government car, increased the size of her staff, and helped her rewrite her job description in a manner that would support reclassifying her position as a GS-14.[11]

In October 1999, Ehemann again instructed Lutkewitte to attend an out-of-town FBI conference, this one in Ocean City, Maryland; Lutkewitte objected, but Ehemann insisted she attend. When Ehemann directed Lutkewitte to arrive at the conference a day early, Lutkewitte successfully appealed that instruction to a higher FBI official. At the Ocean City conference, Ehemann followed Lutkewitte around, left notes under her door, and knocked and banged on her door. Following those incidents, Lutkewitte reported Ehemann's harassment to FBI officials.

FBI officials promptly transferred Ehemann to another FBI office, and he had no further contact with Lutkewitte. A subsequent FBI internal investigation concluded that Ehemann's conduct

> had the effect, if not the purpose, of creating an inappropriate work environment for Supervisory Computer Specialist Janet Lutkewitte, who was placed in the untenable position of having to rebuff

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[10] J.App. 59-61.

[11] J.App. 64-69.

> his advances and risk retaliation (although the evidence does not reflect that any had been explicitly threatened by Mr. Ehemann), or to acquiesce to them, to the detriment of her personal well-being.[12]

The FBI also concluded that there was a perception at the Washington Field Office that "women under [Ehemann's] command were allowed more privileges and freedoms than men." (App. 15a). The FBI Office of Professional Responsibility recommended that Ehemann be severely disciplined; FBI officials instead permitted Ehemann to retire before that occurred.[13]

During the course of the FBI internal investigation, Lutkewitte for the first time learned that Ehemann had had sexual intercourse with her in January 1999; by that time already under psychiatric care, Lutkewitte unsuccessfully attempted suicide.[14] Lutkewitte remains an employee of the FBI.

Lutkewitte brought suit in the District Court for the District of Columbia, alleging *inter alia* that the events in question constituted sexual harassment in violation of Title VII of the 1964 Civil Rights Act. As provided in Title VII, Lutkewitte named as the defendant the Attorney General of the United States in his official capacity.

Much of the litigation in the district court, like the Question Presented, concerned whether the FBI was legally liable for Ehemann's abusive actions. The standards governing employer liability for sexual harassment

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[12] J.App. 132-35.

[13] J.App. 95-96, 111-115, 117, 132-35.

[14] J.App. 58, 87-89.

derive from this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Under *Ellerth* and *Faragher* an employer is strictly liable for sexual harassment by a supervisor that involves a "tangible employment action." Absent a tangible employment action, an employer can usually establish an affirmative defense by demonstrating both that it took reasonable care to prevent and correct any harassment and that the plaintiff unreasonably failed to take advantage of the preventative and corrective measures.

The central issue below was whether the actions taken by Ehemann constituted tangible employment actions under *Faragher* and *Ellerth*. Lutkewitte relied in particular on Ehemann's official action in ordering her to come to New York in January 1999, and in providing her with certain employment benefits after she had submitted to (or had been subjected to) his sexual advances. The government contended that Ehemann's conduct as a matter of law did not constitute tangible employment actions.[15] That question remained unresolved when the case went to trial in December 2003. The disagreement regarding what constitutes a "tangible employment action" came to a head in a dispute regarding the jury instructions. Petitioner asked the trial court to give the following "tangible employment action" instruction to the jury:

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[15] The government also disputed Lutkewitte's contention that the benefits were provided to her because of her submission to Ehemann's sexual harassment. The government filed two motions for partial summary judgment regarding whether Ehemann's actions constituted tangible employment actions; both were denied.

> If you find that Ehemann sexually harassed the plaintiff, then you must find the FBI liable for the harassment if you find that any of the following is true:
>
> (1) Ehemann used his authority as plaintiff's supervisor at the FBI to compel her attendance at an inspection in New York enabling him to take advantage of her; OR
>
> (2) Ehemann's words or conduct would have communicated to a reasonable person in the Plaintiff's position that she would suffer negative job consequences if she did not submit to his sexual demands; OR
>
> (3) Ehemann gave Plaintiff certain favorable job benefits because she submitted to his sexual demands.

(App. 2a, 16a). The trial judge rejected this instruction, and declined to instruct the jury that any of these circumstances would render the FBI liable for the harassment.

In the absence of that tangible employment action instruction, the government's liability for Ehemann's actions effectively turned on the existence of the affirmative defense recognized by *Faragher* and *Ellerth*. The jury concluded that Ehemann's actions had created a hostile work environment, but also found that the government had established the elements of that affirmative defense. The jury thus entered a verdict for respondent on the sexual harassment claim. (App. 3a).

The question on appeal was whether the district court had erred in refusing to give the tangible employment action instruction. That turned largely on a dispute as to what constitutes a tangible employment action. The

District of Columbia Circuit adopted a legal standard under which none of the official actions taken by Ehemann constituted tangible employment actions.[16]

The court of appeals held that Ehemann's action in directing Lutkewitte to come to New York, an action taken for the purpose of enabling Ehemann to make sexual advances on Lutkewitte, did not constitute a tangible employment action.

> Ehemann's directive to appellant that she come to New York where she may have been more vulnerable to his advances was not a tangible employment action. While his order may have conditioned appellant's job on her attending the New York conference, it did not condition either her job or benefits on submission to Ehemann's subsequent advances.

(App. 6a).[17] On this view, use by a supervisor of official power to require a sexual harassment victim (on pain of possible dismissal) to have sex might be a tangible employment action, but use of that same official power to require the victim (on pain of possible dismissal) to come

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[16] The court of appeals concluded that the other proffered instruction was improper because, regardless of whether Lutkewitte reasonably believed that she would be retaliated against if she resisted Ehemann's advances, that belief would not itself have been based on a tangible employment action. (App. 10a). The rejection of this portion of the instruction thus rested on the court's view that the direction to come to New York and the bestowing of certain benefits did not themselves constitute tangible employment actions.

[17] *See* App. 46a-47a ("a short business trip is not a 'significant change in employment status . . . ' *Ellerth*, 524 U.S. at 761 (concurring opinion)).

to a location where she could be (and was) sexually assaulted is not a tangible employment action.

The court of appeals also upheld the trial court's refusal to instruct the jury that the FBI should be found liable if Ehemann gave plaintiff job benefits "because she submitted to his sexual advances." The court of appeals held that certain job benefits which Ehemann may have awarded[18] to Lutkewitte in connection with the sexual harassment did not constitute tangible employment actions because the benefits involved were not sufficiently important. Any such rewards for submission to sexual harassment could not constitute a tangible employment action, the court of appeals ruled, unless they "constitute a significant change in employment status." (App. 7a, 8a).[19]

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[18] The court of appeals concluded that there was insufficient evidence that the award of certain other job benefits had occurred because of Lutkewitte's submission to the sexual harassment. App. 7a-8a (permission to use government car as a "take-home car"), 8a-9a (increase in overtime pay).

[19] With regard to Ehemann's action in providing Lutkewitte with a new car, the court of appeals held that

> appellant's assertion that her receipt of a "brand new car" in 1999 was evidence of a tangible employment action is specious. Ms. Lutkewitte already had a take-home car, . . . so a *new* one created no significant change in her ability to effectively perform her job duties or on the conditions of her employment and, therefore, was not a "tangible" benefit.

(App. 7a) (emphasis in original).

The court on similar grounds found legally insufficient the official actions which Ehemann had taken to increase Lutkewitte's staff and to help her obtain a promotion:

> [T]he two relevant actions taken by Ehemann – his efforts to obtain a GS-14 position description for appellant and his oversight of the augmentation of appellant's staff – simply

(Continued on following page)

Judge Brown, in a concurring opinion, reasoned that the disputed jury instruction was improper because the official actions to which it referred were not *adverse* to Lutkewitte. (App. 25a-46a). Judge Brown noted that with regard to this issue "[o]ur sister circuits have taken a wide variety of approaches." (App. 27a).

REASONS FOR GRANTING THE WRIT

This case presents a recurring issue of pivotal importance to employer liability for sexual or other harassment violative of Title VII of the 1964 Civil Rights Act.[20] This Court has repeatedly held that an employer is strictly liable for sexual harassment by a supervisor where that harassment involves a "tangible employment action." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). In the absence of a tangible employment action, an employer may be able to establish an affirmative defense

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do not rise to the level of "tangible employment actions" under *Faragher* and *Ellerth*.

(App. 8a; *see* App. 46a ("The provision of those benefits ... is not tangible, as none of the benefits is as 'significant' as 'hiring, firing [or] failing to promote.' *Ellerth*, 524 U.S. at 761") (concurring opinion; footnote omitted)).

[20] The lower courts have applied the *Faragher* and *Ellerth* approach to harassment claims under other federal statutes. *E.g., Arrieta-Colon v. Wal-Mart Puerto Rico*, 434 F.3d 375 (1st Cir. 2006) (Americans With Disabilities Act); *Howard v. City of Robertsdale*, 168 Fed. Appx. 883 (11th Cir. 2006) (constitutional claim under section 1983); *Plautz v. Potter*, 156 Fed. Appx. 812 (6th Cir. 2005) (Rehabilitation Act); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004) (Age Discrimination in Employment Act).

to liability for that harassment.[21] Whether a tangible employment action occurred is thus the pivotal initial inquiry in determining employer liability in any Title VII action concerning sexual or other harassment by a supervisor.[22]

The decisions of this Court have articulated divergent standards regarding what constitutes a tangible employment action. The inconsistency between the standards set out in this Court's own opinions has understandably led to a conflict among the courts of appeals regarding this important issue. As Judge Brown noted in her concurring opinion below, "much uncertainty remains regarding the definition of a 'tangible employment action,' a phrase used only once before [*Ellerth* and *Faragher*.]" (App. 24a-25a).

I. THE DECISIONS OF THIS COURT HAVE ANNOUNCED INCONSISTENT DEFINITIONS OF A TANGIBLE EMPLOYMENT ACTION

This Court's seminal decision in *Ellerth* contains several distinct explanations of a tangible employment action. One such passage seems to define a tangible employment action fairly narrowly.

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[21] The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765.

[22] "Determination whether the complaining employee has suffered a tangible employment action is the indispensable first step in every supervisor sexual harassment/vicarious liability case under Title VII." *Casiano v. AT&T Corp.*, 213 F.3d 278, 285 (5th Cir. 2000).

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

524 U.S. at 761. If this were the standard, the actions of a supervisor would only constitute a tangible employment action if three requirements were all met; those actions would have to (1) affect the "employment status" of the plaintiff, (2) involve a change in that status, and (3) cause a change which is "significant." This formulation is in some tension with the list that follows; "failing to promote" is not "a significant change,"[23] it is the absence of any change.

Ellerth also contains a number of passages that focus more narrowly on actions that are harmful to the interests of the plaintiff. It held, for example, that an employer will always be strictly liable "when a supervisor takes a tangible employment action *against* a subordinate." 524 U.S. at 762-63 (emphasis added).[24] This has led some lower court judges, including one member of the panel in the court

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[23] *Ellerth* also lists "denial of a raise" as an example of a tangible employment action. 524 U.S. at 761.

[24] *See* 524 U.S. at 760 ("we can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action *against* the subordinate") (emphasis added), 761 ("[i]n the context of this case, a tangible employment action would have taken the form of a *denial* of a raise or a promotion") (emphasis added), 761-62 ("[w]hen a supervisor makes a tangible employment decision, there is assurance the *injury* could not have been inflicted absent the agency relation") (emphasis added), 764 ("Ellerth has not alleged she *suffered* a tangible employment action.") (emphasis added).

below, to conclude that under *Ellerth* "a tangible employment action must be adverse."[25] On this view, even a significant change in employment status would not constitute a tangible employment action unless that change were unfavorable to the interests of the employee.

The explanation in *Ellerth* of *why* an employer is strictly liable when a "tangible employment action" occurs, on the other hand, suggests a decidedly broader meaning for that phrase.

> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act.

524 U.S. at 762. This rationale would be equally applicable to any "official act" by a supervisor, regardless of the type or magnitude of that action on the plaintiff. This broader standard is consistent with the basic focus of *Ellerth* on whether the supervisor was clearly aided in the harassment by the authority conferred on him by the employer.

In *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), this Court again addressed the meaning of a tangible employment action, in deciding when a constructive discharge involves (or constitutes) a tangible employment action and thus gives rise to strict liability. This Court in *Suders* held that an "official act" is a tangible employment action, and that a constructive discharge thus

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[25] "[O]nly adverse actions can truly fill the admonitory role for which the Court created the concept of tangible employment actions." (App. 30a).

gives rise to strict liability only where it was precipitated by an official act of a supervisor. *Suders* repeatedly equated a tangible employment action with any "official act" by a supervisor. "The tangible employment action, the Court [in *Ellerth*] elaborated, is, in essential character, 'an official act of the enterprise, a company act.'" 542 U.S. at 144. "*Ellerth* and *Faragher* . . . divided the universe of supervisor-harassment claims according to the presence or absence of an official act." 542 U.S. at 150.[26]

> We conclude that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a "tangible employment action," however, the defense is available to the employer. . . .

542 U.S. at 140-41.[27] *Suders* referred repeatedly to the existence of an "official act" as the touchstone of employer strict liability.[28]

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[26] Similarly, *Suders* refers to two "Court of Appeals decisions that indicate how the 'official act' (or 'tangible employment action') criterion should play out." 542 U.S. at 149. This sentence necessarily means that "official act" and "tangible employment action" are synonymous.

[27] [W]hen an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer.

542 U.S. at 148.

[28] 542 U.S. at 148 ("[u]nlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be") (emphasis in original), 148 ("a harassment claim . . . may or may not involve official action"; occurrence of "an official act of the enterprise" may alert employer to the possibility that a resignation was compelled in some way; "an official act" demonstrates that the supervisor used his managerial position), 148-49 ("[a]bsent . . . an official act, the extent to which the supervisor's misconduct has been aided by the

(Continued on following page)

This holding in *Suders* was specifically advocated by the United States. In an amicus brief, the government urged the Court to adopt the broader of the alternative meanings originally suggested by *Ellerth*. "[U]nder *Ellerth*, a tangible employment action is an action that 'requires an official act of the enterprise, a company act.'" Brief for the United States as Amicus Curiae, p. 22) (*quoting Ellerth*). "Strict liability is triggered by an official act of the enterprise." *Id.* at 25. A constructive discharge, the government argued, results in strict liability if, but only if, it was the result of some "official act" of the harassing supervisor. *Id.* at 27-28.

This broader definition of tangible employment action adopted in *Suders* was essential to the disposition of that case. The plaintiff in that case resigned after her supervisors at the state patrol, assertedly as part of a pattern of misogynistic harassment, placed Ms. Suders in handcuffs, read her *Miranda* warnings, and took her to an interrogation room. 542 U.S. at 136. This Court noted that those steps, if proven, could constitute "official action," and remanded the case for a resolution of the disputed facts. 542 U.S. at 152 and n.11. If, however, tangible employment action required a "significant change in employment

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agency relation . . . is less certain"), 150 (constructive discharge in cited case did not give rise to strict liability because "the supervisor's behavior involved no official actions"; strict liability appropriate in another case because the constructive discharge was the result of "official actio[n]").

Suders used a number of similar phrases to define a tangible employment action. 524 U.S. at 148 ("[*Faragher* and *Ellerth*] make clear that official directions and declarations are the acts most likely to be brought home to the employer"), 150 (no strict liability where supervisor's actions "involved no direct exercise of company authority").

status," this Court would have directed dismissal of Suders' claim, because the brief detention of the plaintiff did not affect her employment status at all.

On the other hand, *Suders* also quoted the statement in *Ellerth* that a tangible employment action "constitutes a significant change in employment status," 542 U.S. at 144, a definition entirely inconsistent with the holding and disposition in *Suders* itself. And *Suders* repeated several passages in *Ellerth* describing a tangible employment action as an action taken "against" a plaintiff. In the decision below, one member of the panel construed *Suders* as emphatically rejecting the idea that any official act is a tangible employment action. (App. 31a-34a).

This question regarding the definition of a tangible employment action was extensively briefed, but not resolved by this Court, in *Burlington Northern Rwy. Co. v. White*, ___ S.Ct. ___ (June 22, 2006). The Sixth Circuit in *White* had held that a retaliatory act is unlawful under section 704(a) of Title VII only if it would constitute a "tangible employment action" within the meaning of *Ellerth* and *Faragher*. *White v. Burlington Northern, Rwy. Co.*, 364 F.3d 789, 795-98 (6th Cir. 2004) (en banc). The petitioner in *White*, relying in particular on *Ellerth*, urged this Court to hold that only a "significant change in employment status" constitutes a tangible employment action.[20] The respondent, relying in particular on *Suders*,

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[20] Brief for Petitioner, *Burlington Northern Rwy. Co. v. White*, No. 05-259, pp. 8-9

> ("this court in *Ellerth* held that for liability to attach, there must be 'an official act of the enterprise, a company act' that constitutes 'a significant change in employment status. . . . ' . . . Neither of White's retaliation claims satisfies the *Ellerth*

(Continued on following page)

argued that any official act is a tangible employment action.[30] This Court did not resolve that dispute. The majority opinion concluded that the standard for a retaliation claim under section 704(a) of Title VII is distinct from the legal standards applicable to a sexual harassment claim under section 703, and thus had no occasion to decide what would constitute a tangible employment action in a section 703 claim such as the instant case. (Slip opinion, pp. 6-12).

This important question of federal law should be settled by this Court because *only* this Court can resolve such a dispute about conflicting standards in its own decisions. *See Ring v. State of Arizona*, 536 U.S. 584 (2002) (certiorari granted to resolve conflict between *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Walton v. Arizona*, 497 U.S. 639 (1990));[31] *Wolfle v. United States*, 291 U.S. 7, 12 (1934) (explaining decision in *Funk v. United States*, 290 U.S. 371 (1933)). "[C]ertiorari has been granted . . . where it involves a question upon which prior decisions of the Supreme Court are irreconcilable or inconsistent." R. STERN, G. GRESSMAN, S. SHAPIRO AND K. GELLER, SUPREME COURT PRACTICE, 234-35 (8th ed. 2002).

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standard. A supervisor's alteration of the mix of duties that an employee performs within her existing job classification simply is not an official act of the enterprise that constitutes a 'significant change in employment status.' ")

[30] Brief for Respondent, *Burlington Northern Rwy. v. White*, No. 05-259, p. 31 ("*Suders* contains numerous passages which reiterate that whether a supervisor's action is a tangible employment action turns on whether the supervisor used his or her supervisory authority").

[31] The petition in *Ring* relied solely on that conflict; there was no inter-circuit conflict. Petition for Writ of Certiorari, *Ring v. Arizona*, 2001 WL 34092083 at 8-12.

II. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS REGARDING WHAT CONSTITUTES A TANGIBLE EMPLOYMENT ACTION

The differences between *Ellerth* and *Suders*, and the conflicting definitions of tangible employment action within each of those decisions, has understandably bred confusion among the lower courts.

The Fifth, Seventh and District of Columbia Circuits insist that an official act is not a tangible employment action unless that official act also causes "a significant change in employment status." In *Roebuck v. Washington*, 408 F.3d 790 (D.C. Cir. 2005), the sexual harassment culminated in a decision to place the plaintiff under the supervision of a different manager. The plaintiff in *Roebuck* relied on this Court's decision in *Suders* in arguing that any official act constitutes a tangible employment action.[32] The District of Columbia Circuit, relying instead on *Ellerth*, held that an official act is not tangible employment action unless it causes a "significant change in employment status."[33]

> According to Roebuck, "[t]he focus of the *Faragher/Ellerth* standard of vicarious liability is on the fact of the official action, not on the degree of impact" it had. Roebuck's asserted "focus" is far different from that of the Supreme Court. Indeed, in defining "tangible employment action," the Court could hardly have been more clear that it is not

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[32] Reply Brief for Appellant, *Roebuck v. District of Columbia*, No. 04-7063, passim.

[33] The District of Columbia Circuit also endorsed the "significant change in employment status" standard in *Jones v. District of Columbia Department of Corrections*, 429 F.3d 276, 278 (D.C. Cir. 2005).

> "the fact of the official action," as Roebuck would have it, but its effect upon the plaintiff that matters. *See Ellerth*, 524 U.S. at 761 (tangible employment action entails "a significant change in employment status.")

408 F.3d at 793. The court of appeals held that the reassignment of the plaintiff was not a tangible employment action because the impact of that reassignment on the plaintiff was not sufficiently "significant." *Id.* The District of Columbia Circuit again applied this "significant change in employment status" standard in the instant case. (App. 7a, 8a).

In *Harper v. City of Jackson Municipal School District*, 149 Fed. Appx. 295 (5th Cir. 2005), the sexual harassment culminated in a decision to transfer the victim from teaching at a high school to teaching at a middle school, and the denial of the opportunity to gain experience by temporarily acting as an assistant principal. The Fifth Circuit, applying the *Ellerth* formula of a "significant change in employment status," held that these actions did not constitute tangible employment actions because they were "too minor" and "cannot be characterized as a significant change in her employment status." 149 Fed. Appx. at 299-300. In *Murray v. Chicago Transit Authority*, 252 F.3d 880 (7th Cir. 2001), the alleged harasser took official action against the victim, barring her from travel to a business conference, because she had spurned his romantic overtures; the Seventh Circuit held that that official act was not a tangible employment action because it did not "significantly affect [the plaintiff's] job responsibilities or benefits." 252 F.3d at 888.

Several circuits, on the other hand, regard the exercise of official power by a supervisor as sufficient to establish

the existence of a tangible employment action. The Second Circuit recently explained that the occurrence of "an official company act" constitutes a tangible employment action and thus results in strict liability:

> The Supreme Court created the *Faragher/Ellerth* affirmative defense because it saw a difference between (1) situations in which the supervisor's harassing acts plainly invoked his official power and were therefore undoubtedly aided by the supervisor's agency relationship with the employer and (2) situations in which the use of official power was less clear. . . . *Suders*, 642 U.S. at 145. . . . In the former situation, the official power granted by the employer to the supervisor was used to harass the employee, so the employer is held strictly liable for the supervisor's misconduct and the affirmative defense may not be raised. *Id.*

Ferraro v. Kellwood Co., 440 F.3d 96, 101 (2d Cir. 2006). In *Jin v. Metropolitan Life Insurance Co.*, 310 F.3d 84 (2d Cir. 2002), the Second Circuit held it was error to give a jury instruction which required the plaintiff to prove "a significant change in employment status" in order to establish strict liability. 310 F.3d at 90. The harasser in *Jin* had used his authority as the plaintiff's supervisor to "requir[e] Jin . . . to attend weekly Thursday night private meetings in his locked office," during which he would forcibly engage in sexual acts. 310 F.3d at 88. The Second Circuit held that the fact that the harasser

> as a supervisor could require Jin to report to his private office where he could make his threats and carry on his abuses . . . supports the claim that [the harasser's] empowerment was as the company's agent.

310 F.3d at 94.

In *Holly D. v. California Institute of Technology*, 339 F.3d 1158 (9th Cir. 2003), the Ninth Circuit held that the use of official power to engage in sexual harassment gives rise to strict liability, even though there is no resulting alteration in the employment status of the plaintiff. The Ninth Circuit held that a tangible employment action occurs whenever a supervisor is aided in the harassment by "bringing to bear" his official authority. 339 F.3d at 1169. If a supervisor uses threats of adverse official acts to facilitate the harassment, those threats involve the exercise of official power and thus constitute tangible employment actions. Such coercion

> depends on the same abuse of supervisorial authority – the power, for example, to hire and fire – that, *Faragher/Ellerth* held, renders a discharge a "tangible employment action." In such cases, the supervisor brings to bear the weight of the employer's enterprise in order to achieve the unlawful purpose.

339 F.3d at 1168.

The Sixth Circuit has taken yet a third position, holding that a tangible employment action involves two distinct elements; the action complained of must be an official act and it must be adverse to the plaintiff. "The Supreme Court distinguishes between supervisor harassment unaccompanied by an adverse official act and supervisor harassment accompanied by a 'tangible employment action.'" *Collette v. Stein-Mart, Inc.*, 126 Fed. Appx. 678, 682 (6th Cir. 2005). In this articulation "adverse official

act" is deemed synonymous with a tangible employment action.

Perhaps because of the ambiguity in *Ellerth*, which suggested several different definitions of a tangible employment action, the United States has itself taken a number of distinct positions regarding this issue. In May 2002, in a memorandum filed in the district court in this case, the United States insisted that only a significant *adverse* action could constitute a tangible employment action.[34] The United States reiterated that position in another memorandum filed in the District Court in November,

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[34] Memorandum of Points and Authorities in Support of Defendant Ashcroft's Motion for Summary Judgment, *Lutkewitte v. Ashcroft*, Civil Action No. 00-2484 (JR) (D.D.C.), 21-22 (emphasis in original):

> [T]he *Faragher* defense is available with respect to harassment by a supervisor so long as the supervisor does not "take[ ] a tangible employment action against the subordinate." *Ellerth*, 524 U.S. at 760. In this case, Ms. Lutkewitte specifically acknowledges that she did not suffer any adverse employment action as a result of her refusal to submit to sexual demands by Mr. Ehemann . . . .
>
> Discovery responses from Ms. Lutkewitte may be read to suggest, however, a view that the defense is unavailable where the plaintiff *benefits* from a tangible employment action granted by the supervisor/harasser, suggesting that there is no requirement that a tangible employment action be taken *against* her. . . .
>
> Ms. Lutkewitte's position on this issue is unfounded . . . as a matter of law. . . . The plain and unambiguous language of the *Ellerth* decision itself – quoted above – makes clear that the defense is available only where a supervisor takes a tangible employment action "against" a subordinate. . . . Other appellate courts addressing the application of the defense have reiterated this standard and focused exclusively upon whether such an employment action was taken against the employee.

2003,[35] candidly acknowledging that "[i]t appears that the Circuit Courts are not in agreement on this issue."[36] In January 2004, on the other hand, the United States filed with this Court a brief in *Suders* urging (correctly in our view) that any official act by a supervisor constitutes a tangible employment action.[37] Then in July 2005 the government filed its appellate brief in the instant case advancing yet a third position, arguing that a tangible employment action requires either "an adverse, tangible job consequence" or a threat to take an action with such a consequence.[38] The government assured the court of appeals below that "[a]t no time has appellee argued that a tangible employment action has to be adverse,"[39] a representation in some tension with the position which the government had taken in the district court.

This inter-circuit conflict is not one which the courts of appeals are capable of resolving. The lower courts are

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[35] Federal Defendant's Memorandum of Points and Authorities, *Lutkewitte v. Ashcroft*, Civil Action No. 00-2484 (JR) (D.D.C.), 9-11:

> [U]nder the Court's *Faragher/Ellerth* decisions, unconditional liability attaches only if a *quid pro quo* threat is implemented by some form of sufficiently concrete employment action. An unfulfilled, or inchoate, *quid pro quo* threat by a supervisor is not enough. . . . [W]hen an employee submitted to the supervisor's demands, where a supervisor makes favorable decisions that affect the terms and conditions of a plaintiff's employment, such as awarding benefits or merely permitting the victim to keep her job, such action involved only "unfulfilled threats."

[36] *Id.* at 12.

[37] *See* p. 18, *supra*.

[38] Brief for Appellee, *Lutkewitte v. Gonzales*, No. 04-5058 (D.C. Cir.), 19-21.

[39] *Id.* at 20.

divided because this Court's decisions in *Ellerth* and *Suders* articulate distinct and conflicting standards for determining what constitutes a tangible employment action. Only a decision by this Court can resolve the resulting uncertainty and disparities in outcome. No purpose would be served by forcing the lower courts to continue grappling with this issue; this Court's decisions in *Ellerth* and *Suders* have clearly framed the issue and spelled out the alternative possible standards.

III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THIS ISSUE

The instant case provides an appropriate vehicle for resolving this conflict regarding the definition of a tangible employment action. The circumstances of this single case pose three major questions raised by the conflicting standards in *Ellerth* and *Suders*: (1) Does a tangible employment action require a "significant change in employment status," or is an official act sufficient?[40] (2) If a significant change in employment status is required, must that change be adverse to the plaintiff?[41] (3) If a significant change in employment status is required, what is the standard for determining when such a change is "significant"?[42]

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[40] Both the majority and concurring opinions below addressed this issue.

[41] The concurring opinion below addressed this issue.

[42] Both the majority and concurring opinions below addressed this issue.

The outcome of this case – and the correctness of the jury instructions which the courts below refused to give – are controlled by the resolution of the Question Presented.

If a tangible employment action is an *official act*, the interpretation advanced by the United States in this Court in *Suders*, that standard is clearly satisfied in the instant case. The order by Ehemann directing Lutkewitte to come to New York (ostensibly) on FBI business was unquestionably an official act; it "plainly invoked [Ehemann's] official power." *Ferraro v. Kellwood Co.*, 440 F.3d at 101 (2d Cir. 2006). As the court of appeals noted, Lutkewitte could have faced discipline for disobeying such an order. (App. 6a). That directive indisputably "aided in" the sexual abuse that followed, because by obeying the order and coming to New York Lutkewitte (as the harassing supervisor clearly intended) was uniquely vulnerable to Ehemann's advances. Similarly, awarding government benefits to Lutkewitte because she had submitted to sexual advances clearly would constitute an official act.

If, on the other hand, a tangible employment action requires an *adverse* and significant alteration in the victim's employment status (the position originally advanced by the government in the district court), the decision below was correct. The official actions taken by the supervisor – ordering Lutkewitte to come to New York and bestowing various benefits on her – do not meet that standard.

And if, as one formulation in *Ellerth* suggested, a tangible employment action is a "significant change in employment status," the order directing Lutkewitte to come to New York would not be a tangible employment action, since it was too fleeting to alter her employment

status. Whether the more enduring official benefits bestowed on Lutkewitte would constitute a tangible employment action would turn on the magnitude of change required to be "significant," a matter on which the lower courts remain uncertain.

Certiorari would be particularly appropriate in this case because of the gravity of the abuses which often occur when, as here, a harasser specifically uses his official authority to engage in the harassment. Verbal abuse and brief unwanted touching can occur in an ordinary office or plant; but if a harasser intends to sexually assault or rape his victim, that often requires the use of official authority to compel the victim to go to a more private location where she can be attacked. Ehemann could not have assaulted Lutkewitte in January 1999 if she had been in her office at the Washington Field Office of the FBI, a few blocks from the J. Edgar Hoover Building. Those attacks were possible only because Ehemann used his authority to order Lutkewitte to come to New York and check in to a hotel.

Sexual abuse of particular gravity often relies on such misuse of official authority. *See, e.g., Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1440-41 (10th Cir. 1997) (supervisor ordered victim to go with him to "an unoccupied section of the mine," where he compelled her to engage in sexual acts); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1301-03 (2d Cir. 1995) (victim ordered to go to out-of-town business dinner, after which she was raped by supervisor and two other workers); *Gary v. Long*, 59 F.3d 1391, 1394 (D.C. Cir. 1995) (under the pretext of inspecting a work site, supervisor drove victim to a secluded facility where he raped her); *Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417, 420 (11th Cir. 1999) (harasser repeatedly ordered victim to ride with him in a

car; once she was in the confined space he groped her and demanded sex); *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1043 (App. 2d Dist. 1996) (prospective employee told to come to business meeting at private home, where he was drugged and gang-raped); *Catchpole v. Brannon*, 36 Cal. App. 4th 237, 242 (App. 1st Dist. 1995) (supervisor ordered victim to come to his home to discuss work issues and then forced her to engage in sexual acts).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgement and opinion of the District of Columbia.

Respectfully submitted,

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JANET L. LUTKEWITTE, APPELLANT
v.
ALBERTO GONZALES,
ATTORNEY GENERAL, APPELLEE

No. 04-5058

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

369 U.S. App. D.C. 286; 436 F.3d 248;
October 14, 2005, Argued
February 3, 2006, Decided

COUNSEL: Tracy L. Gonos argued the cause for appellant. With her on the briefs was George M. Chuzi.

Heather Graham-Oliver, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were Kenneth L. Wainstein, U.S. Attorney, and Michael J. Ryan, Assistant U.S. Attorney. R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

JUDGES: Before: TATEL and BROWN, Circuit Judges, and EDWARDS,* Senior Circuit Judge. Opinion for the Court filed Per Curiam. Opinion concurring in the Judgment filed by Circuit Judge BROWN.

OPINION:

Per Curiam: This cause was considered on the record from the United States District Court for the District of Columbia, and was briefed and argued by counsel. It is hereby Ordered and Adjudged that the judgment of the District Court is affirmed.

Throughout 1999, appellant, Ms. Janet Lutkewitte, who is employed by the Federal Bureau of Investigation

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* Senior Circuit Judge Edwards was in regular active service at the time of oral argument.

("FBI"), was sexually harassed by her supervisor, David Ehemann. During this period, Ehemann engaged in repugnant and reprehensible conduct by harassing Ms. Lutkewitte with unwelcome sexual advances, including forced submission to his sexual demands. Appellant filed suit in the District Court on October 17, 2000, against both Ehemann and the Attorney General of the United States in his official capacity, alleging *quid pro quo* sexual harassment, hostile work environment, and retaliation in violation of, *inter alia,* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (2000). Ms. Lutkewitte settled with Ehemann on the eve of trial. The District Court entered judgment for the Government on December 19, 2003, following a jury verdict.

During the course of the trial, Ms. Lutkewitte asked the trial court to give the following "tangible employment action" instruction to the jury:

> If you find that Ehemann sexually harassed the plaintiff, then you must find the FBI liable for that harassment if you find that any of the following is true:
>
> (1) Ehemann used his authority as plaintiff's supervisor at the FBI to compel her attendance at an inspection in New York enabling him to take advantage of her; OR
>
> (2) Ehemann's words or conduct would have communicated to a reasonable person in the Plaintiff's position that she would suffer negative job consequences if she did not submit to his sexual demands; OR
>
> (3) Ehemann gave Plaintiff certain favorable job benefits because she submitted to his sexual demands.

Joint Appendix ("J.A.") 254-55 (footnotes omitted). The trial judge, however, declined to instruct the jury to consider whether Ehemann's sexual harassment of Ms. Lutkewitte culminated in a tangible employment action.

On a Special Verdict Form, the jury found that (1) appellant had proven a hostile work environment, (2) the FBI had proven that it exercised reasonable care to prevent any sexually harassing behavior on the part of Ehemann, (3) the FBI had proven that it exercised reasonable care to promptly correct any sexually harassing behavior by Ehemann, and (4) the FBI had proven that Ms. Lutkewitte unreasonably failed to take advantage of the preventive and corrective opportunities provided her, or that she otherwise unreasonably failed to avoid harm. *Id.* at 325. The jury thus entered a verdict for appellee on the claim of hostile work environment sexual harassment. *Id.* The jury also entered a verdict for appellee on the claim of retaliation. *Id.* at 326.

In *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), the Supreme Court "delineate[d] two categories of hostile work environment claims: (1) harassment that 'culminates in a tangible employment action,' for which employers are strictly liable, and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense." *Pa. State Police v. Suders,* 542 U.S. 129, 143, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004) (quoting *Ellerth,* 524 U.S. at 765, and citing *Faragher,* 524 U.S. at 807-08). In explaining when an employer is subject to vicarious and strict liability to a victimized employee for an actionable

hostile environment created by a supervisor, the Court offered the following guidance:

> At the outset, we can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate. Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action.
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> . . . .
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> . . . A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.
>
> . . . .
>
> When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.
>
> . . . .
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> In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by

> objecting employees, we adopt the following holding in this case and in *Faragher v. Boca Raton* . . . . An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Ellerth, 524 U.S. at 760-62, 764-65.

On appeal, appellant claims that the District Court "committed reversible error when it failed to give the jury a tangible employment action instruction permitting it to find that the FBI was strictly liable for Ehemann's sexual harassment of Lutkewitte." Br. for Appellant at 16. In advancing this claim, Ms. Lutkewitte asserts that *Faragher* and *Ellerth* "compel the conclusion that a 'tangible employment action' occurs when a subordinate is coerced into submitting to a supervisor's sexual demands for fear of losing her job or otherwise being penalized with respect to the terms and conditions of her employment." *Id.* at 17. On this reading of the case law, she contends that the District Court was obliged to find, as a matter of

law, that "Ehemann's sexual harassment culminated in a tangible employment action thereby rendering the FBI strictly liable," *id.* at 18, or at least to submit the question to the jury, *id.* at 16-18. Under this view, Ms. Lutkewitte must produce record evidence that her job or significant employment benefits were conditioned on her sexual submission. *See Holly D. v. Cal. Tech.*, 339 F.3d 1158, 1174 (9th Cir. 2003); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 98 (2d Cir. 2002). Without ruling on the validity of Ms. Lutkewitte's legal theory, we reject both of her contentions as the record before us contains no such evidence.

We reject appellant's first two proposed instructions out of hand. Ehemann's directive to appellant that she come to New York where she may have been more vulnerable to his advances was not a tangible employment action. While his order may have conditioned appellant's job on her attending the New York conference, it did not condition either her job or benefits on submission to Ehemann's subsequent advances. As for appellant's claim that she feared losing her job if she did not submit, there is insufficient evidence to justify considering her submission itself a tangible employment action. Appellant offered nothing to suggest that Ehemann implicitly or explicitly conditioned her continued employment on her acquiescence to his sexual overtures.

Appellant's brief principally focuses on her contention that her ability to receive job-related benefits was conditioned on her submission to Ehemann's demands. At trial, appellant attempted to show both that she received job benefits and advancements and that those benefits and advancements were conditioned on her sexual submission to Ehemann. Specifically, appellant's brief contends that, "shortly after [appellant] acquiesced to his advances,

Ehemann approved and paid for unlimited overtime work totaling approximately $23,000, payments he had previously refused to authorize; he obtained a *brand new* government car for her use[;] . . . . [and] during the period when he was sexually imposing himself on her on a daily basis, he took tangible steps to promote [appellant] by expanding her staff and supervisory responsibilities." Br. for Appellant at 29-30. The record, however, is devoid of any evidence to support the existence of a "tangible employment action," and nowhere indicates that any of the job benefits she received were conditioned on her sexual submission to Ehemann.

First, appellant's assertion that her receipt of a "brand new" car in 1999 was evidence of a tangible employment action is specious. Ms. Lutkewitte already had a take-home car, Trial Tr. at 89, (12/16/03), J.A. 99, so a *new* one created no significant change in her ability to effectively perform her job duties or on the conditions of her employment and, therefore, was not a "tangible" benefit. *See Ellerth,* 524 U.S. at 761 (requiring tangible employment actions "constitute a significant change in employment status such as . . . a significant change in benefits"); *Roebuck v. Washington,* 366 U.S. App. D.C. 71, 408 F.3d 790, 793 (D.C. Cir. 2005) (requiring tangible employment actions have a "significant effect" on a plaintiff's employment status, work, or benefits). In addition, appellant's brief contends that Ehemann repeatedly denied her rightful access to her original take-home vehicle, *see* Br. for Appellant at 4, but nothing presented at trial confirms this claim. Ms. Lutkewitte never asserted at trial that Ehemann had previously improperly denied her a car. Indeed, Government witness Edward Shubert, the assistant special agent in charge of the administrative services

division of the FBI at the time, testified that take-home vehicles were assigned "based on the needs of the FBI, in this case, the needs of the Washington field office." Trial Tr. at 107 (12/17/03), J.A. 146. Appellant therefore presented no evidence remotely suggesting that Ehemann's approval of her access to a new car was conditioned on her sexual acquiescence.

Appellant's claim that Ehemann allegedly took "tangible steps" to put her in a position to receive a promotion proves nothing. For one thing, there is no evidence in the record to indicate that appellant was ever promoted. *See id.* at 31, J.A. 68. Furthermore, in the context of appellant's claim, the two relevant actions allegedly taken by Ehemann – his effort to obtain a GS-14 position description for appellant and his oversight of the augmentation of appellant's staff – simply do not rise to the level of "tangible employment actions" under *Faragher* and *Ellerth*. Ms. Lutkewitte asserted, but never submitted any admissible evidence to prove, that staff augmentation was an important step toward promotion, and never argued that the expansion of her staff led to reduced workload or that increased supervisory authority alone was a tangible benefit. Nothing here therefore indicates that Ehemann's behavior culminated in the actions condemned by *Faragher* and *Ellerth*.

Finally, in her brief to this court, appellant claims that,

> throughout the period Ehemann supervised [appellant], he denied authorization for virtually all of the overtime she worked to complete her assigned duties. This changed as Ehemann began to impose himself sexually on [appellant] and . . .

> starting at the end of 1998 Ehemann approved virtually all of the overtime [appellant] claimed.

Br. for Appellant at 11 (emphasis omitted); *see also* Trial Tr. at 73 (12/15/03), J.A. 44 (appellant asserting that in the "last half of 1998" she was granted increased access to overtime pay). Both before the District Court and in her appellate brief, however, Ms. Lutkewitte relies on the temporal proximity of her increased overtime pay and her submission to Ehemann in January 1999 to establish that Ehemann conditioned her pay on her acquiescence. Trial Tr. at 59-60 (12/18/03), J.A. 211-12 (arguing that Ms. Lutkewitte demonstrated conditioning based on Ehemann's conveyance of employment benefits "contemporaneously with or very shortly after" Ms. Lutkewitte's sexual acquiescence in January 1999); Br. for Appellant at 29 (same). Because any alleged increased access to overtime pay began before her submission to Ehemann's advances in January 1999, Ms. Lutkewitte failed to offer adequate evidence of causation to warrant a tangible employment action instruction on this claim.

The record thus offers nothing to support appellant's tangible employment action claim. It neither suggests that appellant received benefits that qualify as tangible employment actions, nor otherwise demonstrates that benefits were conditioned on appellant's sexual submission. There is no evidence anywhere in the record to support appellant's assertion that Ehemann implicitly threatened her with a loss of job, demotion, or other tangible employment action if she declined to submit to his advances. Ehemann's harassing conduct was unspeakably offensive and repulsive, but the coercion that is inherent in a supervisor-employee relationship, without more, is not enough upon which to hold an employer strictly liable for a

supervisor's sexual harassment. *Ellerth*, 524 U.S. at 760; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

Because there is no evidence of a tangible employment action, we agree with the District Court that no reasonable jury could find that appellant's receipt of job benefits was the result of her sexual submission. We find no need, and indeed think it improper, to address larger questions regarding the extent to which *Faragher* and *Ellerth* are applicable in the "submission" context. The Supreme Court has not addressed whether an employer can be held strictly liable when an employee submits to her supervisor's sexual demands because she reasonably believes that her benefits or continued employment are conditioned upon her acquiescence, although the Second and Ninth Circuits have addressed these issues. *See Holly D.*, 339 F.3d at 1169 (finding that *Faragher* and *Ellerth* apply in the submission context); *Jin*, 310 F.3d at 94 (same). But because all of Ms. Lutkewitte's claims fail based on factors this court has already considered – either on the significance of the employment action taken or on causation – and because the government challenges her claims only on these grounds, we need not decide the novel legal questions raised by Ms. Lutkewitte's requested instructions: whether benefits can constitute tangible employment actions or whether submission in the face of *quid pro quo* harassment itself constitutes a tangible employment action. *See* Br. for Appellee at 20 ("At no time has appellee argued that a tangible employment action has to be adverse or that a threat has to be explicit. Rather, appellee argues that there must be some evidence that the tangible employment action is conditioned upon unwelcomed sexual activity."). This court should decide these important

questions only when the facts the plaintiff presents demand their resolution.

The District Court did not issue an opinion in this case and the parties did not squarely address these larger issues in their briefs or in arguments to this court. We therefore believe that it would be a mistake "to address far-reaching questions on which we [might] disagree, when they are wholly unnecessary to the disposition of the case." *PDK Labs., Inc. v. DEA,* 360 U.S. App. D.C. 344, 362 F.3d 786, 809-10 (D.C. Cir. 2004) (Roberts, J., concurring). As Justice Frankfurter once put it: "These are perplexing questions. Their difficulty admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Whitehouse v. Ill. Cent. R.R. Co.,* 349 U.S. 366, 372-73, 75 S. Ct. 845, 99 L. Ed. 1155 (1955).

In sum, we hold that, on the record here, the District Court did not err in declining to give the jury a tangible employment action instruction or in refusing to grant appellant a judgment as a matter of law on her claim of strict liability.

CONCUR:

BROWN, *Circuit Judge, concurring in the judgment*: While I concur in the decision to affirm the district court's refusal to give a requested jury instruction, I write separately to suggest a legal – rather than a factual – justification for our judgment. The legal question at the core of this case is a narrow one: whether any of Janet Lutkewitte's allegations, even if accepted as true, qualifies as a "tangible employment action" under the framework established by the Supreme Court in *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d

662 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). Lutkewitte's proposed instruction was consistent with the evidence presented at trial and the legal standard applied by two other circuits; however, that legal theory – while superficially appealing – seems analytically dubious. For the reasons outlined below, I conclude the district court properly refused the instruction.

I

A

At issue here is a difficult subcategory of sexual harassment cases sometimes referred to as submission cases – that is, cases in which the complaining employee submits to the sexual advances of the supervisor. These cases pose unique problems because the employee may have suffered no adverse employment consequences, and hence no economic harm. Lutkewitte argued forcefully that an employer is strictly liable in submission cases for the supervisor's sexual harassment of the employee if a reasonable person in the employee's position would have feared that rejecting the supervisor's advances would have led to retribution. Under her view, an employee's submission or acquiescence in such circumstances constitutes a tangible employment action. *See Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1167 (9th Cir. 2003) (stating that a tangible employment action occurs when an employee complies with a supervisor's sexual demands in order to avoid a threatened adverse action); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 97 (2d Cir. 2002) (stating that a tangible employment action occurs when a supervisor uses his authority to impose on an employee the added job requirement that she submit to sexual abuse in order to

retain her employment). The trial judge initially expressed skepticism in response to this argument, noting that a tangible employment action usually inflicts direct economic harm and requires an official act of the enterprise, documented in official company records and subject to higher level review. Apparently, though, he eventually accepted the basic premise of *Jin* and *Holly D.*, because in denying Lutkewitte's motion for judgment as a matter of law, he did not reject her legal theory. Instead, he found she had presented no evidence that her continued employment was conditioned on providing her supervisor with sexual favors. Lutkewitte then requested a jury instruction that reflected her view of the law, but the judge rejected this proposed instruction, perhaps again finding insufficient evidence, though not elaborating further on his reasoning.

A party is entitled to an instruction on any legal theory that has a basis in the law and the record. *Joy v. Bell Helicopter Textron, Inc.*, 303 U.S. App. D.C. 1, 999 F.2d 549, 556 (D.C. Cir. 1993); *see also Horton v. Buhrke*, 926 F.2d 456, 460 (5th Cir. 1991). The majority finds insufficient evidence that the supervisor made sexual favors a condition of employment, and thus finds the instruction inappropriate on that ground. This approach 1) assumes the validity of the legal theory underlying the proposed instruction and 2) sets the evidentiary bar extremely high. Ordinarily, a victim of sexual harassment need not prove that continued employment or benefits were expressly conditioned or explicitly threatened based on the level of sexual complaisance. As *Holly D.* itself explained: "It is enough that the individual making the unwelcome sexual advance was plaintiff's supervisor, and that a link to employment benefits could [reasonably] be

inferred under the circumstances." *Holly D.*, 339 F.3d at 1173 (quoting Ming W. Chin et al., Cal. Practice Guide Employment Litig. ¶ 10:51 (2002)) (alteration in original). Therefore, while I agree with the majority that we should not address "far-reaching questions" that are "wholly unnecessary to the disposition of the case," Op. at 10 (quoting *PDK Labs., Inc. v. DEA*, 360 U.S. App. D.C. 344, 362 F.3d 786, 809-10 (D.C. Cir. 2004) (Roberts, J., concurring)), I believe Lutkewitte presented enough evidence to meet this minimal threshold and support an instruction under her theory of the law. Thus, the soundness of Lutkewitte's view of the law must be examined, as the proposed instruction would be justified only if it is *both* legally and factually sufficient.

B

The sequence of events alleged by Lutkewitte is distressing; her account was essentially uncontested at trial and needs to be recounted here only briefly. Lutkewitte is employed as a supervisory computer specialist for the Federal Bureau of Investigation (FBI, or Bureau) and worked at the Bureau's Washington Field Office during the relevant times. From 1996 to 1999, David Ehemann supervised Lutkewitte – first as her second-line supervisor and later as her direct supervisor. Starting in March 1998, Ehemann began making romantic and sexual overtures to Lutkewitte. He asked her out to dinner when they attended out of town conferences, behaved flirtatiously, and told her "don't worry about getting your [promotion to GS-]13, you'll get your 13, and if you stick with me you'll go higher." In January 1999, Ehemann ordered Lutkewitte to assist him during an inspection in New York, where he pressured her into undesired sexual

intimacies to which she acquiesced because she thought she would lose her job if she told him to stop. After the New York trip, Ehemann's pursuit of Lutkewitte included kissing her hello and goodbye at work, following her, sending her personal e-mails, and rubbing up against her when he thought they were unobserved. She never told him to stop, because she feared losing her job, but she did try to discourage him and avoid him. Also during this time, an FBI internal investigation concluded that Ehemann "has earned a perception of dealing differently with women in his unit than with men," namely that "women under his command were allowed more privileges and freedoms than men."

Lutkewitte claims – although this point was strongly contested at trial – she first became aware of the Bureau's sexual harassment policies in October 1999. She reported Ehemann's conduct, and the Bureau launched an immediate investigation. Disciplinary measures were recommended, but Ehemann retired before any of those actions (other than his immediate reassignment) was taken. The investigative report acknowledged Ehemann's "conduct had the effect, if not the purpose, of creating an inappropriate work environment" for Lutkewitte, who "was placed in the untenable position of having to rebuff his advances and risk retaliation (although the evidence does not reflect that any had been explicitly threatened by Mr. Ehemann), or to acquiesce to them, to the detriment of her personal well-being."

II

Lutkewitte brought suit against the FBI, alleging sexual harassment in violation of Title VII of the Civil

Rights Act of 1964. After a trial, the jury found Lutkewitte had proven she was subjected to a hostile work environment, but also found 1) the FBI took reasonable care to prevent Ehemann's sexually harassing behavior, 2) the FBI exercised reasonable care to promptly correct that behavior, and 3) Lutkewitte unreasonably failed to take advantage of preventive or corrective opportunities, or "unreasonably failed to avoid harm otherwise."

Lutkewitte claims the trial court erred by denying her request for a jury instruction containing the following language:

> If you find that Ehemann sexually harassed the plaintiff, then you must find the FBI liable for that harassment if you find that any of the following is true:
>
> 1) Ehemann used his authority as plaintiff's supervisor at the FBI to compel her attendance at an inspection in New York enabling him to take advantage of her; OR
>
> 2) Ehemann's words or conduct would have communicated to a reasonable person in the [p]laintiff's position that she would suffer negative job consequences if she did not submit to his sexual demands; OR
>
> 3) Ehemann gave [p]laintiff certain favorable job benefits because she submitted to his sexual demands.

Lutkewitte proffered several examples of "favorable job benefits" she allegedly received during the time in question. She claims that in 1998, Ehemann began allowing her to receive overtime pay in cash rather than in a mix of cash and compensatory time off, as she had

previously received. She claims that after March 1998, Ehemann allowed her to use an FBI vehicle as a take-home car, a privilege that she had not been granted before that time, and that this car was upgraded to a new model in 1999. Also in 1999, Ehemann allegedly authorized her to replace the computer she used when working from her home. In addition, Lutkewitte alleges that Ehemann offered to let her "write up" a promotion to a GS-14 position for herself, but she declined to do so. Nevertheless, he increased the staff that reported to her, which was a prerequisite for such a promotion. Lutkewitte's testimony was ambiguous as to the specific dates when some of these changes occurred, but she did state that Ehemann "seemed to allow everything after New York."

Giving a jury an instruction unsupported by *any* evidence is "clearly error," as an "instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court." *United States v. Breitling*, 61 U.S. (20 How.) 252, 254-55, 15 L. Ed. 900 (1858). Similarly, if a proposed instruction misstates the law, the trial court should not give it to the jury and is not obliged "to tinker with the flawed proposed instruction until it [is] legally acceptable." *Rogers v. Ingersoll-Rand Co.*, 330 U.S. App. D.C. 198, 144 F.3d 841, 843 (D.C. Cir. 1998). Based on the evidence presented at trial, a jury could have found that any or all of the three actions described in the proposed instruction did actually occur. Regarding the first prong of the instruction, Lutkewitte claimed Ehemann directly ordered her to join him in New York. Regarding the second prong of the instruction, she testified that she feared losing her job or her benefits if she resisted his advances, and in light of Ehemann's alleged aggressive

behavior, a jury could have found Lutkewitte's beliefs to be reasonable.[1] Finally, regarding the third prong of the instruction, she presented evidence that Ehemann granted her various benefits during the period in which she was being harassed and that he had previously promised that she would "go higher" professionally if she stuck with him. While some of the benefits were granted before the ill-fated trip to New York in January 1999, Ehemann's harassment began in March 1998; Lutkewitte had thus already been submitting to his lower-intensity harassment months before the New York incident. The FBI itself concluded that Lutkewitte "was placed in the untenable position" of choosing either to submit to Ehemann's demands or "to rebuff his advances and risk retaliation"; the Bureau's opinions have no legal effect here, but they at least suggest that a jury could reasonably come to the same conclusion.

Hence, Lutkewitte's proposed instruction did have a basis in the record, *Joy*, 999 F.2d at 556, which a jury could think sufficient to establish the facts suggested by the instruction, *Breitling*, 61 U.S. (20 How.) at 254-55. It is not this court's role to decide whether a jury ought to have believed Lutkewitte's version of events; no further discussion of the factual record is required. This conclusion, however, leaves unanswered the question of whether Lutkewitte's proposed instruction misstated the law. *See Rogers*, 144 F.3d at 843. If the events alleged by Lutkewitte do not satisfy the legal standard for tangible

[1] Despite the language of the proposed instruction, the majority does not address the reasonableness of Lutkewitte's fears in light of the overall circumstances, asserting instead that she lacked evidence of "conditioning." Op. at 6.

employment actions under *Faragher* and *Ellerth*, then the district court properly refused to give the proposed instruction.

III

Title VII of the Civil Rights Act of 1964 states that:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1). The term "employer" is defined to include agents of the employer. *Id.* § 2000e(b). In 1986, the Supreme Court endorsed guidelines previously issued by the Equal Employment Opportunity Commission (EEOC) in which "sexual harassment" was declared to be a form of sex discrimination prohibited by Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). The Court distinguished between cases where sexually harassing conduct was "directly linked to the grant or denial of an economic *quid pro quo*" and those cases where the conduct created a "hostile environment" without such an economic linkage. *Id.* While both types of cases were declared to be actionable, the conduct in hostile environment claims "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (alteration in original) (citation omitted). However, the Court concluded that employers are not "always automatically liable for sexual harassment by their supervisors," although "absence of notice to an

employer does not necessarily insulate that employer from liability." *Id.* at 72. While not providing specific rules for an employer's vicarious liability, the Court did state that "Congress wanted courts to look to agency principles for guidance in this area." *Id.*

In the years after *Meritor,* the Courts of Appeals – including this court – developed a rule that *quid pro quo* harassment by a supervisor would result in strict liability for the employer. *See Gary v. Long,* 313 U.S. App. D.C. 403, 59 F.3d 1391, 1395-96 (D.C. Cir. 1995). We held that for *quid pro quo* liability to be imposed on the employer, "the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." *Id.* at 1396. "To hold otherwise would be to impose liability on the employer without evidence that the supervisor had acted as its agent"; therefore, we concluded that if the supervisor's "threats were not carried out," a plaintiff could not "make out a claim of *quid pro quo* sexual harassment." *Id.* On the other hand, "a supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors . . . may create or contribute to a hostile work environment." *Id.* Under traditional agency principles, an employer would not be liable for such conduct if it was outside the scope of the supervisor's employment, but one exception to this rule was that an employer could be liable if the agent "was aided in accomplishing the tort by the existence of the agency relation." *Id.* at 1397 (emphasis and citation omitted). In a sense, the existence of the agency relationship always aids the supervisor's harassment, because "his responsibilities provide proximity to, and regular contact with, the victim." *Id.* We stated that an employer could avoid liability for

hostile work environment claims if it was "able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences." *Id.* at 1398.

In 1998, however, the Supreme Court provided a new framework for analyzing vicarious employer liability in sexual harassment cases. *See Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998); *Burlington Indus. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). Citing *Gary,* the Court endorsed vicarious liability for the employer when the supervisor is aided in accomplishing the harassment by the existence of the agency relationship. *Ellerth,* 524 U.S. at 760. However, the Court recognized a tension between this principle and *Meritor*'s holding that an employer is not always automatically liable for harassment by its supervisors: "If the 'aid' may be the unspoken suggestion of retaliation by misuse of supervisory authority, the risk of automatic liability is high." *Faragher,* 524 U.S. at 804. To effectuate the limitation of liability recognized in *Meritor,* the court considered "two basic alternatives, one being to require proof of some affirmative invocation of that authority by the harassing supervisor, the other to recognize an affirmative defense to liability in some circumstances, even when a supervisor had created the actionable environment." *Id.* Fearing that the first option would lead to too many judgment calls and difficult issues of proof, the Court chose to establish an affirmative defense that could protect employers from liability. *Id.* at 805. Thus, the Court held:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, *see* Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. at 807; *Ellerth,* 524 U.S. at 765.

"No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Faragher,* 524 U.S. at 808; *Ellerth,* 524 U.S. at 765. "When a supervisor takes a tangible employment action against the subordinate," then "beyond question, more than the mere existence of the employment relation aids in commission of the harassment." *Ellerth,* 524 U.S. at 760. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. In such situations, the Court explained, "there is assurance the injury could not have been inflicted absent the agency relation," and in most cases, "direct economic harm" is inflicted on the employee. *Id.* at 761-62. "As a

general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury," as "tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 762. Moreover, "[a] tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Id.* "For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. . . . In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability. . . . " *Id.* at 762-63.

The Court also clarified the proper use of the terms "*quid pro quo*" and "hostile work environment." "In the wake of *Meritor,* [the terms] acquired their own significance," because courts acted as if the "standard of employer responsibility turned on which type of harassment occurred." *Id.* at 752-53. *Ellerth* clarified, however, that those terms are only relevant "when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII." *Id.* at 753. "The terms . . . are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this they are of limited utility." *Id.* at 751. In other words, "the principle significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive." *Id.* at 752. In a *quid pro quo* case, where the "plaintiff proves that a tangible employment action resulted from a refusal

to submit to a supervisor's sexual demands, . . . the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Id.* at 753-54. In hostile work environment cases – including cases where a supervisor's threats are unfulfilled – the plaintiff must show "severe or pervasive conduct" for the harassment to be actionable under Title VII. *Id.* at 754. Once actionable sexual harassment of either type has been shown, however, the old labels are no longer useful: the new affirmative defense framework, "and not the categories *quid pro quo* and hostile work environment, will be controlling on the issue of vicarious liability." *Id.*

The facts of *Ellerth* are also informative. The plaintiff in *Ellerth* was subjected to verbal sexual harassment, and her supervisor threatened that he "could make [her] life very hard or very easy" at the company, depending on whether she "loosened up." *Id.* at 748 (internal quotation marks omitted). Ellerth alleged that her supervisor's comments amounted to threats to her tangible job benefits, although the threats went unfulfilled (because Ellerth eventually resigned). *Id.* at 747-48. The Supreme Court stated that "Ellerth had not alleged she suffered a tangible employment action" at the hands of her supervisor and remanded the case for the district court to determine whether the employer could establish the affirmative defense. *Id.* at 766.

IV

Despite the Supreme Court's attempt in *Faragher* and *Ellerth* to establish a framework that would clarify and unify sexual harassment law, much uncertainty remains

regarding the definition of a "tangible employment action," a phrase used only once before those decisions.[2] One question still unanswered after those pathmarking cases is whether a tangible employment action must be "adverse." Many of the examples given in *Ellerth*'s definition of the phrase are adverse actions: "firing" and "failing to promote," *id.* at 761, and "discharge, demotion, or undesirable reassignment," *id.* at 765. Others, however, are more ambiguous: "hiring," "reassignment with significantly different responsibilities," and "a decision causing a significant change in benefits." *Id.* at 761. The Court also stated that "in most cases" a tangible employment action would "inflict[] direct economic harm" (as opposed to other types of harm), and emphasized that only a superior "can cause this sort of *injury*." *Id.* at 762 (emphasis added). The Court stated that the supervisor is always aided by the agency relationship when he "takes a tangible employment action *against* a subordinate." *Id.* at 762-63 (emphasis added). When the Court stated that it would "import" the concept of a tangible employment action from lower court decisions (albeit "without endorsing the specific results of those decisions"), it cited opinions that used terms such as "materially adverse change" and "materially adverse employment action" drawn from other areas of antidiscrimination law. *Id.* at 761.

We have since stated that "in defining 'tangible employment action,' the Court could hardly have been more clear that it is not 'the fact of the official action,' . . .

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[2] Before June 26, 1998 (the date on which *Faragher* and *Ellerth* were decided), only one opinion, an unreported district court decision, used the precise term. *See Henriquez v. Times Herald Record*, 1997 U.S. Dist. LEXIS 18760, 1997 WL 732444, at *6 (S.D.N.Y. Nov. 25, 1997).

but its effect upon the plaintiff that matters." *Roebuck v. Washington*, 366 U.S. App. D.C. 71, 408 F.3d 790, 793 (D.C. Cir. 2005). To qualify as a tangible employment action, an official act must have a "significant effect" on the plaintiff's employment status, work, or benefits. *Id.* As the plaintiff in *Roebuck* refused her supervisor's advances, *id.* at 791-92, we did not confront the question of how the *Faragher/Ellerth* standard would apply in submission cases. However, we compared the term "tangible employment action" to another concept present in Title VII case law, that of a "materially adverse action."[3] *Id.* at 794 & n.*. Although we did not decide that the two concepts were identical – stating that we had "no reason in this case to doubt" that they were – we did draw on the analogy for the proposition that a sexual harassment plaintiff must allege that the tangible employment action has made her somehow "worse off." *Id.* We stated that an employee's lateral transfer could qualify as a tangible employment action if it "entailed 'materially adverse consequences affecting the terms, conditions, or privileges of her employment.'" *Id.* (quoting *Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 457 (D.C. Cir. 1999)).

Similarly, our cases have frequently referred to the "tangible employment action" concept in the context of discussing adverse employment actions. *See, e.g., Russell v. Principi*, 347 U.S. App. D.C. 222, 257 F.3d 815, 818 (D.C. Cir. 2001); *Brown*, 199 F.3d at 456-57. We have even announced

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[3] *Roebuck* refers to the term "materially adverse action," though assorted variants of the phrase have been used in the Title VII context. *See, e.g., Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 452-53 (D.C. Cir. 1999) (using "adverse employment action" and "adverse personnel action").

that " 'reassignment with significantly different responsibilities, or . . . a significant change in benefits' generally indicates an *adverse* action." *Forkkio v. Powell,* 353 U.S. App. D.C. 301, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (alteration in original) (emphasis added) (quoting *Ellerth,* 524 U.S. at 761). However, we have never chosen to establish a firm rule regarding the relationship between the two concepts. Our sister circuits have taken a wide variety of approaches. Some courts have found that the two concepts are not identical. *See, e.g., Hillig v. Rumsfeld,* 381 F.3d 1028, 1031-33 (10th Cir. 2004); *Ray v. Henderson,* 217 F.3d 1234, 1242 n.5 (9th Cir. 2000). Others have treated them, explicitly or implicitly, as interchangeable. *See, e.g., Herrnreiter v. Chi. Hous. Auth.,* 315 F.3d 742, 744 (7th Cir. 2002); *Davis v. Town of Lake Park, Fla.,* 245 F.3d 1232, 1239 (11th Cir. 2001); *Bowman v. Shawnee State Univ.,* 220 F.3d 456, 461 n.5 (6th Cir. 2000). At least one has chosen, as we thus far have, not to resolve the issue. *See Watts v. Kroger Co.,* 170 F.3d 505, 510 n.4 (5th Cir. 1999).[4]

In light of this case law, particularly *Ellerth* and *Roebuck,* a convincing case can be made that a tangible employment action must be adverse. Although two other circuits have explicitly adopted an opposite view – in cases I shall address below – the degree to which the concept is intertwined with the emphasis on "adverse" actions elsewhere in Title VII jurisprudence strongly suggests this

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[4] In subsequent unpublished cases, however, the Fifth Circuit appears to have merged the two concepts. *See, e.g., Donaldson v. Burlington Indus.,* 2004 U.S. App. LEXIS 18354, No. 03-51362, 2004 WL 1933603, at *2 (5th Cir. Aug. 31, 2004) (stating that "to succeed on a quid pro quo Title VII sexual harassment claim, a plaintiff must show that she suffered an adverse 'tangible employment action'") (footnote omitted).

conclusion.[5] We are obliged to follow the Supreme Court's determinations on this issue, but where its guidance is less than clear, we should tread carefully. The Supreme Court and lower courts frequently treat tangible employment actions and adverse employment actions as being closely related, if not interchangeable. Thus, caution dictates that a definition of tangible employment action should include an element of adversity. *See Newton v. Cadwell Labs.*, 156 F.3d 880, 883 (8th Cir. 1998) (stating that "the absence of a detrimental employment action allows [the employer] to present an affirmative defense" in a sexual harassment suit). This conclusion means only that the employer is not *strictly* liable for a supervisor's harassing conduct in a case involving the exchange of sexual favors for employment benefits. The employer can therefore attempt to defend itself by showing it had reasonable measures in place to prevent such harassment but the employee failed to take advantage of those options for avoiding harm.

This approach is at odds with the stance adopted by the EEOC. Yet while guidelines issued by the EEOC "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," they are not binding. *Meritor*, 477 U.S. at 65

[5] In addition to the Second and Ninth Circuit cases discussed below, the Fourth Circuit has implied that a tangible employment action need not be adverse, although that court has not explicitly confronted the question. *See Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 267-68 (4th Cir. 2001) (stating that "mundane, non-adverse actions" are not tangible employment actions, but also suggesting in dicta that this conclusion "does not mean that the affirmative defense is available when supervisors guilty of sexual harassment do bestow benefits in exchange for an employee's silence"); *Brown v. Perry*, 184 F.3d 388, 395 (4th Cir. 1999).

(internal quotation marks omitted). The relevant guidelines issued by the EEOC after *Faragher* and *Ellerth* state:

> If a supervisor undertakes or recommends a tangible job action based on a subordinate's response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defense. The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. Such harassment previously would have been characterized as "quid pro quo." It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employee's rejection of unwelcome sexual demands, but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands. The Commission rejects such an analysis. In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis. The Supreme Court stated that there must be a significant *change* in employment status; it did not require that the change be adverse in order to qualify as tangible.

EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors § IV(B), 1999 WL 33305874, at *5 (June 18, 1999) (footnote omitted). Contrary to the Commission's belief, such a result would not be "perverse."[6] As I discuss below, the unavailability of

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[6] The EEOC relied on a pre-*Faragher/Ellerth* case to support its statement that the affirmative defense is unavailable in submission cases. *Id.* at *5 & n.36 (citing *Nichols v. Frank*, 42 F.3d 503, 512-13 (9th

(Continued on following page)

the affirmative defense in cases where a tangible employment action has taken place is premised largely on the notice (constructive or otherwise) that such an action gives to the employer – notice that the delegated authority is being used to discriminate against an employee.[7] When an employee is given a benefit, even a benefit equal in magnitude to the actions listed in *Ellerth*, the employer has little reason to suspect that the recipient of the benefit has been discriminated *against*, as Title VII prohibits. *See* 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to discriminate *against* any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .") (emphasis added). Thus, only adverse actions can truly fill the admonitory role for which the Court created the concept of tangible employment actions.

When a benefit is given for discriminatory reasons, other employees may be unhappy about being denied that same benefit (and may therefore be able to file their own complaints), but the employment action itself has not injured the harassment victim. The victim has been subjected to harassment, and the employer is still

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Cir. 1994)). For reasons discussed below, *infra* n.9, this reliance was misplaced.

[7] This reasoning is consistent with the *Meritor* Court's statement that "absence of notice to an employer does not necessarily insulate that employer from liability." 477 U.S. at 72. First, the *Meritor* Court was referring only to actual notice, not the constructive notice imputed to employers when a tangible employment action occurs. Second, the absence of a tangible employment action does not "necessarily insulate" an employer from liability, as the employer will still be liable if it is not able to prove the elements of the affirmative defense.

potentially liable for the supervisor's actions. The absence of an adverse tangible employment action only means that the employer retains the opportunity to prove the elements of the affirmative defense. This result sensibly allows the jury to determine whether it was the employer's negligence which caused the employee to be victimized and whether any employment benefits flowed from consensual arrangements – paramour preferences – or from true duress.

V

A

Such an approach is consistent with the Supreme Court's use of the adjective "tangible." When non-adverse actions are taken, an employer has less reason to suspect that its authority is being used to perpetrate harassment, and thus these actions are less "tangible." This concern – that an employer should only be strictly liable when it ought to be on notice that the authority it has delegated is potentially being misused – was emphasized by the Court in a post-*Faragher/Ellerth* case that shed further light on why an employment action must be "tangible" to prevent an employer from asserting the affirmative defense. In *Pennsylvania State Police v. Suders,* 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004), the Court held that a constructive discharge, in which the employee is driven to resign because of harassing conduct, involves both an act of the employee and (possibly) official action:

> But when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer. As those leading decisions indicate, official directions and

> declarations are the acts most likely to be brought home to the employer, the measures over which the employer can exercise greatest control. Absent "an official act of the enterprise," as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force. And as *Ellerth* and *Faragher* further point out, an official act reflected in company records – a demotion or a reduction in compensation, for example – shows "beyond question" that the supervisor has used his managerial or controlling position to the employee's disadvantage. Absent such an official act, the extent to which the supervisor's misconduct has been aided by the agency relation . . . is less certain. That uncertainty . . . justifies affording the employer the chance to establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable.

Id. at 148-49 (citations omitted). After *Suders*, then, the rationale behind the *Faragher/Ellerth* framework is clear: employers may be held vicariously liable for harassment by supervisors, even when the employer did not know about – much less approve of – the harassing behavior. To justify this imposition of liability, the employer is allowed to assert an affirmative defense by showing, *inter alia*, that it acted reasonably to prevent or correct the behavior, despite its imperfect knowledge. When a tangible employment action has occurred, however, the employer has constructive notice that its authority is being used – and potentially misused. If an employee is fired or demoted, for example, the employer still may not know whether harassment motivated the action, but the Court determined that it is fair to place upon the employer a duty to inquire,

to take responsibility for the action, and to assure itself that no discrimination was involved.[8] An employer may choose not to make this investigation, but it does so at its own risk, as it will be held strictly liable for the misuse of its delegated authority in performing tangible employment actions.

Hence, whether an employment action is "tangible" must be determined from the perspective of the employer, as the tangibility – that is, the constructive notice – is what justifies imposing strict liability. If an action is not tangible from the employer's point of view, the employer has no reason to suspect that its authority is at risk of being misused; it has not, in other words, been given a "heads-up" that it should investigate the supervisor's behavior. In a constructive discharge case, such as *Suders*, no tangible employment action takes place when an employee is harassed into quitting. The harassment is certainly tangible from the employee's point of view; if it were not so, she would not resign. Even so, the circumstances do not justify imposing strict liability, as the employer's authority was not used to perform any action that was tangible from the *employer's* point of view. The employer may well be liable for the harassment that led to the resignation, but only if it fails to prove that it acted reasonably to prevent or correct harm and that the employee unreasonably failed to avoid harm. To hold otherwise would undermine the *Faragher/Ellerth* Court's goals in establishing the affirmative defense: avoiding automatic employer liability (consistent with *Meritor*) without the

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[8] For example, some employers may require exit interviews when employees leave; others may require demotions to be justified in writing, as well as being consistent with prior evaluations.

danger of frequent judgment calls and difficult issues of proof. *Faragher,* 524 U.S. at 804-05.

B

Before *Suders* provided this insight, however, two circuits took a view incompatible with the one described above. These circuits not only endorsed the EEOC view that a tangible employment action did not have to be adverse but essentially reversed the perspective from which tangibility is determined. The Second Circuit took its first steps toward this approach in the years before *Faragher* and *Ellerth* laid out the current framework. In *Karibian v. Columbia University,* 14 F.3d 773, 778 (2d Cir. 1994), a submission case similar to the one we address today, that court held that "nothing in the language of Title VII or the EEOC Guidelines . . . supports . . . a requirement" that "evidence of actual, rather than threatened, economic loss" must be presented "in order to state a valid claim of *quid pro quo* sexual harassment." The court reasoned that "evidence of economic *harm* will not be available to support the claim of the employee who *submits* to the supervisor's demands," but "the supervisor's conduct is equally unlawful under Title VII whether the employee submits or not." *Id.* If evidence of harm would be required, "only the employee who successfully resisted the threat of sexual blackmail could state a *quid pro quo* claim"; hence, the court chose not to "read Title VII to punish the victims of sexual harassment who surrender to unwelcome sexual encounters. Such a rule would only encourage harassers to increase their persistence." *Id.* Instead, "the focus should be on the prohibited conduct, not the victim's reaction." *Id.* at 779.

The *Karibian* court's reasoning is incompatible with the current affirmative defense-driven framework. While that court correctly noted that harassing conduct can violate Title VII regardless of the victim's submission or refusal, that insight has no bearing on whether the employer should be allowed to present the affirmative defense. An employer can be held liable for harassing conduct by a supervisor regardless of whether the victim submits or refuses, regardless of whether any official act is taken or not, and regardless of whether any such official action is adverse or not. In any of those cases, the employer may be vicariously liable, but in some of those situations the employer would be strictly liable, while in others it would have the chance to prove an affirmative defense. *Karibian*'s reasoning is no longer useful because it presupposes that whether a harassment claim is labeled as "hostile work environment" or "*quid pro quo*" determines whether an employer is strictly liable. *Faragher* and *Ellerth* made clear that those categorical labels no longer justify vicarious liability by themselves; the labels are only useful during the court's initial determination of whether the plaintiff has stated an actionable claim of supervisory harassment: "Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment" – either *quid pro quo* or hostile work environment claims, under the old framework – but allegations of "the latter must be severe or pervasive" to state an actionable harassment claim. *Ellerth,* 524 U.S. at 752. Regardless of the nature of the underlying claim of harassment, strict liability under the new analytical regime is only imputed when the supervisor's harassment culminates in a tangible employment action taken against the victim; that is, the affirmative defense is unavailable only

when the employer's authority has been used in such a way as to give constructive notice that harassment (of either variety) has occurred. Thus, alleging *quid pro quo* harassment is no longer the standard for strict liability to attach. While the situation that concerned the *Karibian* court – harassment followed by submission – is still problematic, and still actionable, it arguably should be analyzed differently under the *Faragher/Ellerth* framework in order to determine how the affirmative defense applies.

Yet, in *Jin v. Metropolitan Life Insurance Co.*, 310 F.3d 84, 95 (2d Cir. 2002), the Second Circuit preserved the *Karibian* reasoning even after *Faragher* and *Ellerth* had restructured sexual harassment law. In *Jin*, the plaintiff presented evidence that she submitted to her supervisor's sexual demands after he "explicitly threatened to fire her if she did not submit, and then allowed her to keep her job after she submitted." *Id.* at 94. The court found that a tangible employment action occurred when the supervisor, Morabito, "used his authority to impose on [Jin] the added job requirement that she submit to weekly sexual abuse in order to retain her employment." *Id.* According to the court, agency principles supported this finding, as the supervisor's "empowerment by MetLife as an agent who could make economic decisions affecting employees under his control . . . enabled him to force Jin to submit to his weekly sexual abuse." *Id.* The court decided that "despite the differences in terminology [after *Faragher* and *Ellerth*], *Karibian*'s essential holding that an employer is liable in a *submission* case is sound even under the

Supreme Court's new liability analysis."[9] *Id.* at 96. The *Karibian* analysis was shoehorned into the new framework by the proclamation that "when a supervisor 'makes decisions affecting the terms and conditions of [plaintiff's] employment based upon her submission to his sexual advances,' he uses his authority to effect, as the definition [of tangible employment action] states, 'a significant change in employment status.'" *Id.* (first three alterations in original) (citations omitted). Although the employer argued that, as in *Ellerth,* no tangible employment action occurred because the supervisor's threats were never carried out, the court distinguished *Ellerth* on the basis that "Ellerth, unlike Jin, was able to resist her supervisor's advances." *Id.* Jin, on the other hand, "was required to submit to sexual acts and . . . Morabito used that submission as a basis for granting her a job benefit (her continued employment)." *Id.* at 97. The court found this situation to be "substantially different from the type of unfulfilled threat alleged in *Ellerth,* where no job benefit was granted or denied based on the plaintiff's acceptance

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[9] The *Jin* court argued:

> The Court in *Faragher* supported this conclusion by noting the "soundness of the results" in and the "continuing vitality" of cases such as *Nichols v. Frank,* 42 F.3d 503 (9th Cir. 1994) (holding employer vicariously liable where victim submitted to supervisor's requests for oral sex out of fear that she would lose her job if she refused).

Jin, 310 F.3d at 96 n.7 (quoting *Faragher,* 524 U.S. at 791). However, *Jin*'s invocation of *Faragher* is inapposite. The *Faragher* Court was only discussing the situations in which vicarious liability for supervisor harassment had been imputed to employers – not the circumstances when the new affirmative defense would be unavailable. The *Faragher* Court had not even established the affirmative defense at this point in its analysis; it thus quite clearly did not cite *Nichols* as an example of a situation where an employer could not assert the defense.

or rejection of her supervisor's advances." *Id.*[10] The court continued:

> When a victim is coerced into submitting to a supervisor's sexual mistreatment, the threatened detrimental economic tangible employment action may not take place. But that does not mean that the use of the submission as the basis for other job decisions does not also constitute tangible employment action. Because *Faragher* and *Ellerth* support our earlier holding in *Karibian* that economic harm is not required to hold an employer liable in a submission case, we see no persuasive reason to abandon our prior judgment on that issue.

Id. at 98 (footnote omitted). The *Jin* court thus failed to recognize the changes prefigured by *Faragher* and *Ellerth*. *Karibian* found that "economic harm" was not necessary to state a claim of *quid pro quo* harassment, 14 F.3d at 778, but although such a claim brought with it strict liability in the old regime, such analysis is now only the first step. Regardless of which label – hostile work environment or *quid pro quo* – would formerly have been used, the plaintiff must now simply show an alteration in the terms of her employment in order to state an actionable claim of sexual harassment. Perhaps *Karibian*'s rule may still be useful this far in the analysis, as it clarifies that the harassment itself need not cause economic harm. The plaintiff, however, must demonstrate more than *quid pro*

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[10] I find this assertion to be somewhat inconsistent with the *Jin* court's reasoning. While Ellerth was not explicitly threatened with the loss of her job if she did not submit to sexual demands, she received the same "benefit" for tolerating the harassment that Jin did – she retained her job (until she quit). *Ellerth*, 524 U.S. at 748.

quo harassment for strict liability to attach: she must show a tangible employment action. This new requirement was not contemplated in the *Karibian* analysis, which dealt only with actionable conduct, not an affirmative defense.[11] Hence, despite the *Jin* court's claim that *Faragher* and *Ellerth* supported the *Karibian* decision, *Karibian* did not truly provide a basis for *Jin*.

The *Jin* court's failure to acknowledge the new role of a tangible employment action becomes clear in its next paragraph:

> Finally, MetLife relies on a statement in *Ellerth* that a "tangible employment decision requires an official act of the enterprise, a company act." But, assuming Jin's allegations to be true, Morabito's use of his supervisory authority to require Jin's submission was, for Title VII purposes, the act of the employer. This is because Morabito brought "the official power of the enterprise to bear" on Jin by explicitly threatening to fire her if she did not submit and then allowing her to retain her job based on her submission. And though a tangible employment action "in *most* cases is documented in official company records, and *may* be subject to review by higher level supervisors," the Supreme Court did not require such conditions in all cases. Indeed, it would be difficult to imagine either documentation or higher level review in a submission case.

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[11] As noted above, a close reading of *Faragher* and *Ellerth* supports the view that a tangible employment action must be not only tangible but also adverse. *Karibian* is consistent with this rule when properly viewed as addressing only whether a claim of *quid pro quo* harassment has been stated – a determination with far fewer consequences than it used to have.

Jin, 310 F.3d at 98 (citations omitted). By so holding, the Second Circuit removed the requirement of tangibility from the definition of a tangible employment action. As *Suders* later clarified, a tangible employment action is an act "likely to be brought home to the employer" in the sense that the employer is on notice that its authority is being exercised and is thus placed under a duty to ensure that the act is nothing but "the typical kind daily occurring in the work force," rather than the culmination of harassment. 542 U.S. at 148. In *Jin*, the supervisor did not commit any act that should have given his employer notice that he was using (and therefore potentially abusing) the power delegated to him. If the supervisor had actually used his authority, rather than only threatened to use it, the company could have been expected to ensure that the authority had not been misused. Based on the alleged facts, however, no basis existed for holding the company strictly liable for the supervisor's conduct. Of course, upon a showing of such severe harassment, the company would be presumptively liable under *Faragher* and *Ellerth*, but in the absence of an act that was tangible from its own point of view, the company should have been given a chance to prove that it had not been negligent and that the plaintiff had been.

The Ninth Circuit has followed the Second Circuit's approach. *See Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158 (9th Cir. 2003). In *Holly D.*, the plaintiff claimed that her supervisor implicitly threatened to fire her if she did not submit to his sexual demands. *Id.* at 1163-64. The court held that when "in order to avoid the threatened action,

the employee complies with the supervisor's demands," a tangible employment action occurs. *Id.* at 1167.[12]

> In such cases, unlike in *Ellerth,* the threat does not simply remain unfulfilled or inchoate, but rather results in a concrete consequence. The supervisor accomplishes the objective of the threat – the coercion of the sexual act – by bringing to bear the authority to make critical employment determinations on behalf of his employer.

Id. at 1168-69. "Thus, the participation in unwanted sexual acts becomes a condition of the employee's employment – a critical condition that effects a substantial change in the terms of that employment." *Id.* at 1169. While this reasoning is logical, the *Holly D.* court misunderstood its significance. As *Faragher* and *Ellerth* made clear, "Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment [but] the latter must be severe or pervasive" to qualify as a valid claim. *Ellerth,* 524 U.S. at 752. Thus, when "participation in unwanted sexual acts becomes a condition of the employee's employment," *Holly D.,* 339 F.3d at 1169, Title VII is violated. Yet this violation itself only suggests that the employer *may be* liable – under *Faragher* and *Ellerth,* the employer's opportunity to avoid strict liability and assert the affirmative defense depends on another issue, the presence of a tangible employment action. The Ninth Circuit, however, conflated the two steps: "The employer may be held vicariously liable for the supervisor's unlawful conduct and may not take advantage of the

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[12] Though agreeing with the plaintiff's legal theory, the court also found that Holly D. had not presented sufficient evidence in support of her allegations to avoid summary judgment. *Id.* at 1176.

Faragher/Ellerth defense." *Id.* While the first half of that sentence is accurate, the second half is not a necessary corollary.

The Ninth Circuit's reasoning fails for the same reason as does the Second Circuit's: it relies on a pre-*Faragher/Ellerth* case that allowed a claim of *quid pro quo* harassment, with the then-attendant strict liability, "when the employee's continued employment was conditioned on her participation in sexual acts." *Id.* (citing *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994)). The *Holly D.* court implied that *Faragher* and *Ellerth* endorsed the reasoning in *Nichols*, although as noted above, *supra* n.9, the *Faragher* Court did nothing more than note the "continuing validity" of *Nichols* and other cases' holdings that employers *could* be liable in certain situations. *See Faragher*, 524 U.S. at 791. At that point in the *Faragher* decision, the Court had only examined the bases for employer liability; it had not yet formulated the affirmative defense, let alone specified when it would or would not be available. In other words, *Nichols*'s continued validity only pertains to potential employer liability, not strict liability. This distinction necessarily follows from the reduced role played by the *quid pro quo* label after *Faragher* and *Ellerth*: while affixing that label led to strict liability in *Nichols*, it now only serves to demonstrate that an actionable claim of harassment has been stated.

While the Ninth Circuit acknowledged that a plaintiff must demonstrate a tangible employment action in order for strict liability to attach, it eviscerated the "tangibility" requirement in the same way as did the Second Circuit. The court stated that "when the supervisor actually coerces sex by abusing the employer's authority, and thus makes concrete the condition of employment he has

imposed," his harassment "culminates in a 'tangible employment action.'" *Holly D.*, 339 F.3d at 1170. Similarly, the court opined that the "injury" in "[submission] cases – the physical and emotional damage resulting from performance of unwanted sexual acts as a condition of employment – is as tangible as an injury can be." *Id.* at 1171. Regardless of the accuracy of the court's injury assessment, its use of the word "tangible" underscores its fundamental mistake: it analyzes tangibility from the employee's perspective. While this choice is necessary in assessing the victim's injury, the Ninth Circuit analyzed the tangibility of employment actions from the same point of view, contrary to the *Faragher/Ellerth* rationale clarified in *Suders*. Accordingly, the Ninth Circuit found that a tangible employment action occurs "when a supervisor determines that the retention of an employee in the employer's employ will depend on her participation in sexual acts, and then . . . retains her in her position because she does" participate. *Id.* Although some may prefer a rule holding an employer strictly liable for such egregious misconduct, that rule would not comport with the *Faragher/Ellerth* justifications for imputing liability. For the current framework to be internally consistent, tangibility should be determined from the employer's perspective. If a supervisor threatens an employee, and she submits in order to avoid adverse consequences, the supervisor has not committed an "official act" but merely threatened to do so. The employer has no way of knowing that its delegated authority has been brandished in such a way as to coerce sexual submission. While it may still be liable in such a situation, *Faragher* and *Ellerth* dictate that it be given the opportunity to defend its conduct and demonstrate that any negligence was committed by the employee.

Another problematic aspect of the Second and Ninth Circuits' approach to tangibility is that under their standard, tangibility depends on the employee's actions, not the supervisor's. If a supervisor threatens an employee with adverse consequences unless she submits to his sexual demands, and the employee resists, no tangible employment action occurs. However, the employee's reaction can apparently change the nature of the supervisor's action: if she changes her mind and submits, the logic of *Jin* and *Holly D.* would suddenly demand that the supervisor's action be considered tangible, even though the action itself has not been altered. Such a result would be nonsensical; the only aspect of the situation that becomes more tangible is the psychological injury to the employee, not the supervisor's action for which the employer is to be held liable.

Not only is this result illogical, it may also be at odds with the policies considered by the Supreme Court in formulating the *Faragher/Ellerth* framework. Allowing tangibility – and thus the imposition of strict liability – to hinge on the employee's reaction rather than on the supervisor's action itself "undermines the avoidable consequences doctrine which the Supreme Court incorporated into this area of law." *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1226 (M.D. Fla. 2004) (citing *Ellerth*, 524 U.S. at 764). "The Supreme Court's stated goal in *Faragher/Ellerth* was to balance agency principles of vicarious liability with Title VII's basic policy of encouraging employers to promulgate and enforce anti-discrimination/harassment policies and encouraging employees to avoid the harm caused by harassment and discrimination by . . . reporting such misconduct quickly." *Id.* While an employee's response to harassment cannot retroactively transform a threat into a tangible

employment action, her reaction is still important to the effectiveness of Title VII. In order for our sexual harassment law to deter and redress misconduct, victims must report harassing behavior as promptly as possible. To find that a tangible employment action was created by an employee's acting contrary to this policy – submitting to the conduct rather than exposing it – does not conform to the Supreme Court's stated policy goals, let alone the legal framework the Court formulated. The law is a limited tool, and it cannot right every wrong. Empowering employees to report unlawful behavior is far preferable to allowing abusive situations to spiral out of control and attempting to patch up the damage afterwards.

For all these reasons, I would therefore explicitly reject Lutkewitte's reliance on *Jin* and *Holly D.* in support of her contention that a tangible employment action occurred so long as Ehemann used his supervisory authority to coerce her into submitting to his sexual advances. She argues that a reasonable woman in her position would have believed that her job or benefits would be in jeopardy if she did not submit. Hence, by submitting, Lutkewitte ensured that the status quo – her continued employment with the FBI – would be maintained. While this argument may be relevant to determining whether Lutkewitte has stated a claim for sexual harassment, it has no relevance under existing Supreme Court precedent in answering whether a tangible employment action occurred and whether the affirmative defense should therefore be permitted. Threats of future adverse actions (whether explicit or implicit) may culminate in a tangible employment action if carried out, but they do not themselves meet that standard. Ehemann's alleged threats do not become tangible merely because Lutkewitte feared for her

benefits or because the FBI recognized that Ehemann had an ongoing problem with favoring women he supervised.[13] Nor does Ehemann's purported acceleration or augmentation of Lutkewitte's benefits – the use of a new computer and a new car, receipt of overtime compensation in cash rather than a mix of cash and time off, and enhanced supervisory authority – constitute a tangible employment action. The provision of those benefits is not adverse, nor is it tangible, as none of the benefits is as "significant" as "hiring, firing, [or] failing to promote."[14] *Ellerth*, 524 U.S. at 761. In the absence of adverse actions on the record that would place the FBI on constructive notice of Ehemann's actions, no tangible employment action occurred, and the FBI should not be deprived of the opportunity to present its affirmative defense.

VI

Finally, Lutkewitte argues that a tangible employment action occurred when Ehemann used his supervisory authority to require her to join him in New York. She argues that this exercise of his authority placed her in a

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[13] The FBI's knowledge of Ehemann's general reputation for treating female employees differently cannot act as a substitute for a tangible employment action. Even if the FBI knew that Ehemann sometimes acted inappropriately, that knowledge is not equivalent to knowledge (actual or constructive) of specific misuse of delegated authority.

[14] While a promotion to GS-14 clearly would have qualified as "tangible" (though it still would not have been adverse), Lutkewitte did not receive that promotion, and her increased supervisory responsibilities were at most a prelude to a promotion, not themselves comparable in scope to a promotion.

position where he was better able to assault her. In support of this position, Lutkewitte cites *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995). In *Tomka*, the Second Circuit found that an employer could be held liable for harassment by supervisors if the employee could prove at trial that those supervisors used their authority to compel her to attend a meeting, after which she was allegedly raped repeatedly while intoxicated. *Id.* at 1307. However, while *Tomka* may be useful in analyzing whether an employee has stated a cognizable claim of harassment, it sheds no light on *Faragher* and *Ellerth*'s creation of the affirmative defense framework several years later. Ehemann's summoning of Lutkewitte to New York did not have a "significant effect" on Lutkewitte's employment status, *Roebuck*, 408 F.3d at 793; a short business trip is not a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. While the *Ellerth* list of tangible employment actions is not exhaustive, an action must be of comparable significance in order to qualify. Lutkewitte's travel to New York does not qualify as "significant" in this narrow sense, nor was it – on its own – adverse, notwithstanding the alleged subsequent assaults.

In sum, while Lutkewitte's proposed jury instruction was supported by the evidence she presented at trial, the instruction itself was legally flawed. None of Lutkewitte's alleged tangible employment actions merits that title under existing Supreme Court precedent. The district court therefore properly decided not to give Lutkewitte's requested instruction, or any tangible employment action instruction, to the jury. I believe these legal principles,

rather than an assertion of the paucity of the record, provide a stronger justification for our decision and a rationale to guide future cases.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANET L. LUTKEWITTE

Plaintiff(s)

V. Civil Action No. **02-2482**

JOHN ASHCROFT, et al.

Defendant(s)

JUDGMENT ON THE VERDICT
FOR DEFENDANT

(Filed Dec. 19, 2003)

This cause having been tried by the Court and a Jury, before the Honorable James Robertson, Judge presiding, and the issues having been duly tried and the Jury having rendered its verdict; now therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff(s):

JANET L. LUTKEWITTE

take nothing on the complaint against the defendant(s):

JOHN ASHCROFT, et al.

and that the said defendant(s) have and recover costs from the said plaintiff(s).

NANCY MAYER-WHITTINGTON,
Clerk

Dated: 12/19/03 By: /s/ Deborah A. Miller
Deputy Clerk